No. 17-1471

IN THE

# Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
*Petitioner,*

v.

GEORGE W. JACKSON,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE NATIONAL CONSUMER LAW CENTER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT


CECILY C. SHIEL
**Tousley Brain Stephens PLLC**
1700 Seventh Avenue
Seattle, WA 98101
cshiel@tousley.com
206.682.5600

JASON L. LICHTMAN
*Counsel of Record*
**Lieff Cabraser Heimann & Bernstein, LLP**
250 Hudson Street
New York, NY 10013
jlichtman@lchb.com
212.355.9500

## TABLE OF CONTENTS


Page

INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. HOME DEPOT IS INCORRECT TO ALLEGE FORUM SHOPPING ..... 3

A. Despite the growth in debt collection lawsuits, counterclaim class actions are rare. ..... 4

B. When a defendant asserts class counterclaims, they vindicate actual harms that are closely related to the merits of the initial action. ..... 5

C. Holding additional counterclaim defendants to their co-party's choice of forum further principles of substantial justice. ..... 11

II. CONSPIRATORS SHOULD NOT HAVE TWO OPPORTUNITIES TO CHOOSE FEDERAL OR STATE JURISDICTION ..... 13

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Capital One Bank (USA), N.A. v. Deane*,
3:12CV1544 (JBA), 2013 WL 12284471
(D. Conn. June 14, 2013) ..... 13

*EMCC Invest. Ventures v. Rowe*,
2011-P-0053, 2012 WL 4481332
(Ohio Ct. App. Sept. 28, 2012) ..... 11

*HBLC, Inc. v. Egan*,
50 N.E.3d 1185 (Ill. App. Ct. 2016) ..... 11, 12

*Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*,
535 U.S. 826 (2002) ..... 13

*Liberty Credit Servs. Assignee v. Yonker*,
2012-P-0096, 2013 WL 5221219
(Ohio Ct. App. Sept. 16, 2013) ..... 11, 12, 13

*Midland Funding, L.L.C. v. Hottenroth*,
26 N.E.3d 269 (Ohio Ct. App. 2014) ..... 11, 12

*Schweizer v. MacPhee*,
325 A.2d 828 (N.J. Super. Ct. App. Div. 1974) ..... 7

*Taylor v. First Resolution Inv. Corp.*,
72 N.E.3d 573 (2016), *cert. denied sub nom. First Resolution Inv. Corp. v. Taylor-Jarvis*,
137 S. Ct. 398 (2016) ..... 8, 9, 10, 12

*Tri-State Water Treatment, Inc. v. Bauer*,
845 F.3d 350 (7th Cir. 2017) ..... 13

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*United Consumer Fin. Servs. Co. v. Carbo*,
982 A.2d 7 (N.J. Super. Ct. App. Div. 2009).....6, 7, 8

*United Consumer Fin. Servs. Co. v. Carbo*,
No. L-3438-02, 2007 WL 1658478
(N.J. Super. Ct. Law Div. May 30, 2007).....7

*United Consumer Fin. Servs. Co. v. Carbo*,
No. L-3438-02, 2007 WL 954016
(N.J. Super. Ct. Law Div. Mar. 9, 2007).....7

*West v. Aurora City*,
73 U.S. 139 (1867).....12

**Statutes**

Class Action Fairness Act,
28 U.S.C. § 1332(d).....2

Fair Debt Collection Practices Act,
15 U.S.C. § 1692, *et seq.*.....6

**Other Authorities**

*Improving Relief from Abusive Debt Collection Practices*,
127 Harv. L. Rev. 1447 (2014).....10

Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*,
11 Harv. L. & Pol'y Rev. 91 (2017).....4

N.J. Ct. R. R. 4:7-1.....7

## INTEREST OF AMICUS CURIAE[1]

The National Consumer Law Center ("NCLC") is recognized nationally as an expert in consumer credit issues. For nearly 50 years it has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. It publishes a twenty-volume Consumer Credit and Sales Legal Practice Series, including Consumer Class Action, (9th Ed. 2016), Repossessions (9th Ed. 2017), Fair Debt Collection (9th Ed. 2018), and Unfair and Deceptive Acts and Practices (9th Ed. 2016). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers and to promote protections against such practices, and for this reason it has an interest in seeking strong and effective enforcement of consumer protection laws and insuring equal access to justice. NCLC frequently appears as amicus curiae in consumer law cases before trial.

Amicus is concerned that Petitioner Home Depot's proposed interpretation of the removal statutes, if adopted, would radically upset decades of precedent on the standards for removal and impair the ability of consumers to seek fair and meaningful relief.

---

[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus made a monetary contribution to fund the preparation and submission of this brief.

## SUMMARY OF ARGUMENT

This case raises a narrow, atypical issue: whether a third-party counter-defendant may remove a case to federal court under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), notwithstanding that the federal court lacked subject matter jurisdiction over the original parties.

Amicus agrees fully with Respondent Jackson's legal analysis, but respectfully notes that the factual record in this matter is somewhat limited. Accordingly, Amicus writes separately to provide the Court representative examples of fact patterns under which a counter-defendant would attempt to remove a case under CAFA. As explained more fully below, such cases generally arise when the target of a state-court debt collection action counterclaims that the underlying debt is invalid under state law.

Home Depot and its amici argue that class action counterclaims raised in state court are a form of jurisdictional gamesmanship. They are wrong. As this brief explains, class action counterclaims arise in debt collection actions to dispute the merits of the debt itself, frequently alleging an underlying coordinated scam between various counter-defendants. Such claims are intertwined with the merits of the debt collection action, seeking to remedy actual harms related to the debt. And often these are claims that the claimant must raise or else risk losing the right to pursue altogether.

This brief also explains that third-party counter defendants are not strangers to the initial action. To the contrary, their conduct is inextricably bound

with the original state-court plaintiff's legal action. When one party avails itself of state court in an effort to collect another party's fraudulent debt, it is not unreasonable to expect the later to answer the charge that its debt is unlawful in that same forum.

Amicus respectfully stresses that Home Depot and its amici not only seek to change the way removal jurisdiction has worked in a radical manner, but to do so in a way that would impact the ability of consumers to raise meritorious counterclaims in an efficient and fair manner. Accordingly, Amicus asks this Court to affirm the Fourth Circuit and preserve the decades-long status quo.

## ARGUMENT

### I. HOME DEPOT IS INCORRECT TO ALLEGE FORUM SHOPPING

Home Depot and its amici argue that the Fourth Circuit should be reversed to prevent forum shopping. Pet. Br. 41, 45; Br. for Retail Litig. Ctr., Inc., *et al.* as Amici Curiae at 5, 11, 21–22; Br. for Wash. Legal Foundation, *et al.* as Amici Curiae at 14 n.5, 30. They contend that preventing a counterclaim defendant from removing a class action will encourage plaintiffs and their attorneys to seek out state-court actions to turn into loosely-related class cases that would otherwise belong in federal court. In other words, Home Depot believes that a consumer will intentionally default on debt and hope to be sued in state court so that she can file a surprise class claim. And attorneys apparently will scour state dockets in search of improper class opportunities. This is a grim—and absurd—vision.

Federal courts have prohibited counter-defendants from availing themselves of removal jurisdiction for decades, yet state court class action counterclaims are infrequent. And these cases are not the result of forum shopping. They appear to arise only when both: (1) class counterclaims are related directly to the initial claim; and (2) consumers are attempting to redress genuine harm perpetrated by multiple parties, including the original plaintiff.

### A. Despite the growth in debt collection lawsuits, counterclaim class actions are rare.

Over the last few decades, the debt collection industry has grown significantly. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 Harv. L. & Pol'y Rev. 91, 94 (2017). The dramatic rise in consumer debt sparked a rise in the third-party debt collection industry. *Id.* Brokers buy and sell delinquent debt in consolidated portfolios and hire collection agencies or law firms to seek to collect on these debts. *Id.* at 96–98. Litigation is an integral part of this industry, and "[d]ebt buyers file hundreds of thousands" of debt collection lawsuits against defaulted borrowers in state court each year. *Id.* at 98. For example, in 2010, one debt buyer filed more than 517,000 collection lawsuits against consumers in state courts. *Id.*

While debt buyers now file many hundreds of thousands of lawsuits each year, class counterclaims to these lawsuits remain rare. For example, if one searches the nation's state courts for "counterclaim

/10 class" on Westlaw, he receives only 507 results, a significant number of which involve counterclaims to plaintiff-initiated class cases. Home Depot's hypothesis that consumers are attempting to manipulate jurisdiction is belied by this reality.

### B. When a defendant asserts class counterclaims, they vindicate actual harms that are closely related to the merits of the initial action.

Class counterclaims are uncommon in state court and primarily arise in two factual scenarios. First, they arise when the defendant in a collection action contends that she is the victim of a multiparty, coordinated scam involving a financed consumer transaction.[2] In such cases, a party (usually a lender or some assignee thereof) files a debt collection action against a consumer-defendant in state court, and the consumer raises a class counterclaim challenging the validity of the debt or legality of the underlying consumer transaction. When the consumer files that counterclaim, she names any additional parties responsible for the allegedly fraudulent debt as counter-defendants. This is the fact pattern that gave rise to the case before the Court; i.e., Jackson added counter-defendants because he alleges that they fraudulently created his debt.

Second, class counterclaims also arise when a consumer claims that two coordinated entities have

---

[2] Transactions for consumer goods are typically financed in the form of installment payments that consist of both principal and interest.

conspired to violate the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"). In these cases, a party (usually a lender or debt collector), with the help of counsel, files a suit against an individual in state court to collect on an alleged debt. The defendant, disputing that the debt is owed, then asserts class counterclaims against the plaintiff and its counsel for violations of both state law and the FDCPA.

In both of the above fact patterns, class counterclaims are intertwined closely with the merits of the underlying debt collection action, and those class claims seek to redress real harm from coordinated, multi-party deceptive conduct.

1. In cases such as the instant action, a consumer participates in an allegedly wrongful financed consumer transaction. Jackson, for example, alleges that the original plaintiff and two third-party counter defendants were engaged in a scheme to collect an invalid debt, incurred only because the counter defendants violated North Carolina law.

Another example is *United Consumer Fin. Servs. Co. v. Carbo*, 982 A.2d 7 (N.J. Super. Ct. App. Div. 2009) (*"Carbo III"*). In this case, William Carbo purchased a vacuum cleaner from a door-to-door salesman under an installment contract. *Id.* at 13. He executed the contract with a distributor, A & M Merchandizing, Inc. The distributor assigned the contract to United Consumer Financial Services ("UCFS"), which later filed a state collection action against Carbo to collect money Carbo allegedly owed for the vacuum cleaner. *See United Consumer Fin. Servs. Co. v. Carbo*, No. L-3438-02, 2007 WL

1658478 (N.J. Super. Ct. Law Div. May 30, 2007), *aff'd in part, rev'd in part by Carbo III*, 982 A.2d 7 (*"Carbo II"*).

Carbo ultimately responded by filing class counterclaims against UCFS and third-party class claims against A & M. In particular, he alleged that the underlying sales contract was unlawful and deceptive under New Jersey state law and asked the court to void his contract. *Carbo III*, 982 A.2d at 14; *United Consumer Fin. Servs. Co. v. Carbo*, No. L-3438-02, 2007 WL 954016 (N.J. Super. Ct. Law Div. Mar. 9, 2007) (*"Carbo I"*). Carbo also sought to represent a class of consumers, all of whom bought vacuums under this same form contract. The court certified a class, found that the contract violated New Jersey law, and awarded statutory damages to the class. *Carbo III*, 982 A.2d at 15–16, 22–23.

In *Carbo*, as in this case, a consumer defendant to a collection action brought counterclaims to demonstrate that the underlying consumer transaction was invalid under state law. Mr. Carbo *had to raise those arguments in his counterclaim*; had he done otherwise, he would have risked waiving his state law argument entirely. *See Schweizer v. MacPhee*, 325 A.2d 828, 830 (N.J. Super. Ct. App. Div. 1974); N.J. Ct. R. R. 4:7-1 ("A defendant, however, either failing to comply with R. 4:30A (entire controversy doctrine) . . . shall thereafter be precluded from bringing any action for such claim or for such debt or demand which might have been so set off.").

A & M repeatedly attempted to argue to the trial court—and on appeal—that it should not be a

counter-defendant to Carbo's class action claims. *Carbo III*, 982 A.2d at 15. But the courts uniformly rejected this argument, noting that A & M and UCFS worked closely together to craft and execute the underlying contract. *Id.* Indeed, UCFS prescribed specific form contracts for distributors (including A & M) and gave distributors a manual including guidance about the contracts. *Id.* at 14–15. And because UCFS and A & M were so closely intertwined, they were jointly and severally liable for the underlying deceptive conduct regarding the form contract that gave rise to the alleged debt. *Id.*

2. The second fact pattern that can occasionally lead to class counterclaims occurs when a consumer responds to a collection action by challenging the collection itself. In such cases, the consumer will sometimes join an additional counter-defendant and allege that the initial plaintiff and new counter-defendant conspired to violate both the FDCPA and state law. Indeed, the initial state court action is itself sometimes the event that gives rise to a claim under the FDCPA (claims that a defendant must bring or risk waiving).[3]

This was the case in *Taylor v. First Resolution Inv. Corp.*, 72 N.E.3d 573 (2016), *cert. denied sub nom. First Resolution Inv. Corp. v. Taylor-Jarvis*, 137 S. Ct. 398 (2016). This case began when Sandra J. Taylor Jarvis defaulted on certain debt in 2004. *Id.* at 582. The bank to whom she owed that debt

---

[3] It is not unfair—much less "gamesmanship"—for parties to remain in state court to answer the counterclaim alleging that one of those parties filed the initial state court lawsuit wrongfully.

sold the debt to another entity, which, in turn, later sold those rights to First Resolution Investment Corp. ("FRIC"). *Id.* In November 2009, a law firm called Cheek Law Offices ("Cheek") sent Taylor Jarvis a letter informing her that she owed FRIC a massive debt. *Id.* Four months later, FRIC (through Cheek) filed a collection action in Ohio state court seeking, among other things "future interest of 24 percent," and obtained a default judgment for the same. *Id.*

The state court later vacated the default judgment. *See id.* at 582–83. When Taylor Jarvis answered FRIC's complaint, she asserted class-action counterclaims against both FRIC and Cheek. In particular, she contended that when FRIC and Cheek attempted to collect a time-barred debt for an interest rate that would have been impermissible even had the debt not been time-barred, FRIC & Cheek violated both Ohio and federal law. *Id.*

FRIC dismissed its collection complaint against Taylor Jarvis without prejudice, and thereafter the trial court realigned the parties and granted summary judgment to FRIC. *Id.* at 583–84. Taylor Jarvis ultimately persuaded the Ohio Supreme Court to consider her case.

On appeal, the Ohio Supreme Court noted that this case raised issues that were "endemic to the whole debt collection world" and of great interest to the state. *Id.* at 581. Today, debt collection revolves around the common practices of buying and selling debt. Debts are bundled and sold at high volume in portfolios for cents on the dollar. *Id.* at 578–79; *see also Improving Relief from Abusive Debt Collection*

*Practices*, 127 Harv. L. Rev. 1447, 1448 & n.6 (2014). The Ohio Supreme Court observed that because debt is sold in such high-volume, debt buyers frequently do "not receive any documents at the time of purchase" for most of the debt that they are purchasing. *Taylor*, 72 N.E.3d at 579 (quoting *Improving Relief*, 127 Harv. L. Rev. at 1449). It found that "[a] predictable result of debt buyers filing a high volume of lawsuits based on imperfect information is that lawsuits are regularly filed after the right to collect debts has expired or that seek to collect a debt that is not owed; *each year, buyers sought to collect about one million debts that consumers asserted they did not owe.*" *Id.* (emphasis added) (citation omitted).[4] It reversed summary judgment, noting, among other things, that FRIC and Cheek obtained a default judgment awarding interest at a rate six-times the statutory rate. *Id.* at 596.

Put simply, Taylor Jarvis brought legitimate class counterclaims in response to a collection action in which she alleged that action itself was illegitimate. Home Depot's suggestion that someone like Taylor Jarvis is lying in wait for many years, hoping that an unsuspecting company will file a wrongful action against her, should be rejected out of

---

[4] The problems endemic to the debt collection industry are compounded by that industry's reliance on default judgment: "[e]mpirical evidence shows that many debt buyers using a high volume of lawsuits as a component of their recovery strategy rely heavily on the assumption that consumers often fail to show up to contest the case . . . ." *Improving Relief*, 127 Harv. L. Rev. at 1449. "In 2010, the FTC reported that rates of default judgments in debt collection cases ranged from sixty to ninety-five percet [sic]." Stifler, 11 Harv. L. & Pol'y Rev. at 108.

hand. And while class counterclaims are very rare, FDCPA and state consumer protection statute claims make up a substantial portion of the state court collection-action class counterclaims. *See, e.g.*, *EMCC Invest. Ventures v. Rowe*, 2011-P-0053, 2012 WL 4481332, at *1 (Ohio Ct. App. Sept. 28, 2012); *Liberty Credit Servs. Assignee v. Yonker*, 2012-P-0096, 2013 WL 5221219, at *1 (Ohio Ct. App. Sept. 16, 2013); *HBLC, Inc. v. Egan*, 50 N.E.3d 1185, 1188 (Ill. App. Ct. 2016); *Midland Funding, L.L.C. v. Hottenroth*, 26 N.E.3d 269, 273 (Ohio Ct. App. 2014). In *EMCC Invest. Ventures v. Rowe*, 2011-P-0053, 2012 WL 4481332, at *1 (Ohio Ct. App. Sept. 28, 2012).

### C. Holding additional counterclaim defendants to their co-party's choice of forum further principles of substantial justice.

While removal jurisdiction is a matter of statutory interpretation, this Court has noted that holding plaintiffs to their initial choice of forum is also consistent with fundamental principles of fairness:

> In the case before us, . . . citizens of Ohio, voluntarily resorted, as plaintiffs, to the State court of Indiana. They were bound to Know of what rights the defendants to their suit might avail themselves under the code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants

> to a suit, removable on their application to the Circuit Court of the United States.

*West v. Aurora City*, 73 U.S. 139, 142 (1867).

Home Depot challenges this type of analysis, arguing that, as an additional counterclaim defendant, it has been unfairly and unwittingly dragged into the state court forum. Pet. Br. at 44–45. This is inaccurate—Home Depot was no innocent bystander—for the reasons well-explained in Jackson's brief. Resp. Br. at 2–5, 53–54. And this principle holds even more strongly in the FDCPA cases discussed above. In such cases, the additional counterclaim defendant is often the counsel who filed the collection action in state court in the first instance, and the lawsuit frequently exists *solely* because of that state court action. *See Taylor*, 72 N.E.3d at 598 (counterclaims against debt collector and counsel for filing suit to collect on time-barred debt and at excessive interest rate); *HBLC, Inc. v. Egan*, 50 N.E.3d 1185, 1188 (Ill. App. Ct. 2016) (counterclaims against debt collector and counsel for filing suit to collect on time-barred debt); *Midland Funding, L.L.C. v. Hottenroth*, 26 N.E.3d 269, 273 (Ohio Ct. App. 2014) (same).

*Liberty Credit Servs. Assignee v. Yonker* is instructive. 2012-P-0096, 2013 WL 5221219, at *1 (Ohio Ct. App. Sept. 16, 2013). In that case, Liberty (which purchased allegedly delinquent debt) filed a collection action in Ohio municipal court. The ostensible debtor denied that he owed the debt and asserted various counterclaims, including those contending that Liberty *and its counsel* had wrongfully filed the lawsuit against him. Liberty's

counsel then attempted to remove the case to federal court, notwithstanding that "Liberty and [its counsel] chose to file an action in the municipal court." *Id.* at *5. Indeed, the state court chastised Liberty and its counsel for *their* forum shopping. *Id.* at *5–6.

In sum, counter to Home Depot's assertion, the principles articulated in *West* are consistent with fundamental fairness in this case and the rare cases that are similar to it.[5]

## II. CONSPIRATORS SHOULD NOT HAVE TWO OPPORTUNITIES TO CHOOSE FEDERAL OR STATE JURISDICTION

Courts hold unanimously that "removal is not available for a plaintiff who is a counterclaim-defendant." *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 354 (7th Cir. 2017). This is consistent with the principle that the federal basis for removal must be based solely on the allegations in the plaintiff's complaint. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002); *Capital One Bank (USA), N.A. v. Deane*, 3:12CV1544 (JBA), 2013 WL 12284471, at *2 (D. Conn. June 14, 2013). In other words, a defendant cannot create removal jurisdiction by adding a federal counterclaim.

Home Depot and its amici, however, would create a rule in which co-conspirators have *two* chances to

---

[5] It bears emphasis that Congress has never attempted to overrule the principles announced many years ago in *West* and *Shamrock Oil*.

choose the forum, yet the consumer victim has none. Amicus asks this Court not to endorse such an inequitable result against the unanimous weight of precedent and straightforward language of the statute, well-analyzed by Respondent.

## CONCLUSION

Amicus respectfully asks this Court to affirm the opinion of the United States Court of Appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED,

JASON L. LICHTMAN
*Counsel of Record*

**Lieff Cabraser Heimann & Bernstein, LLP**
250 Hudson Street
New York, NY 10013
jlichtman@lchb.com
212.355.9500

CECILY C. SHIEL
**Tousley Brain Stephens PLLC**
1700 Seventh Avenue
Seattle, WA 98101
cshiel@tousley.com
206.682.5600

DECEMBER 17, 2018 *Attorneys for Amicus Curiae*